



In the Matter of:

**OFFICE OF FEDERAL CONTRACT COMPLIANCE
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR,**

CASE NO. 92-OFC-4

DATE: October 28, 1996

PLAINTIFF,

v.

**EXXON CORPORATION d/b/a EXXON COMPANY,
U.S.A.,**

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

This case arises under section 503 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 793 (1994), and implementing regulations set forth at 41 C.F.R. Part 60-741 (1995). The Rehabilitation Act requires covered Federal contractors and subcontractors to “take affirmative action to employ and advance in employment qualified individuals with disabilities.”^{2/}

^{1/} On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia*, the Rehabilitation Act of 1973, and the implementing regulations, to the Administrative Review Board. Secretary’s Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary’s Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions.

^{2/} The Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (Oct. 29, 1992), amended the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b, substituting the term “individuals with disabilities” for “individuals with handicaps.” Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12117 (1994) also addresses “disabilities,” which “represents an effort by [Congress] to make use of up-to-date, currently accepted terminology.” S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989); H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 50-51 (1990). The revision does not reflect a change in definition or substance. *Id.* The Rehabilitation Act states that complaints filed under section 503 and under the ADA should be “dealt (continued...)”

The Administrative Law Judge (ALJ) has recommended that Plaintiff Office of Federal Contract Compliance Programs (OFCCP) should prevail in its complaint. We agree and adopt the ALJ's findings as described below.

FACTUAL BACKGROUND

The ALJ has recounted the facts thoroughly. Recommended Decision and Order (R. D. and O.) at 2-21. Briefly, Complainant Thomas J. Strawser has been employed by Defendant Exxon Company, U.S.A. (Exxon) since 1981. He began work as a senior engineer in Oklahoma City, Oklahoma. In 1982 he was transferred to the company's Dover-Hennessey Gas Plant located north of Oklahoma City. He then worked as a subsurface engineer assigned to the company's Oklahoma City office and in late 1983 became the temporary field foreman at the Hewitt Field in Wilson, Oklahoma. In 1984 Strawser returned to the Dover-Hennessey Gas Plant as temporary field foreman, and in October of that year he joined the start-up team for a natural gas extraction and processing facility in LaBarge, Wyoming. Although stationed initially in Oklahoma City, the start-up team relocated to LaBarge in March 1985. In his start-up capacity Strawser reviewed processes, instrumentation, pressures, flow rates, metallurgy and blueprints. He also wrote job descriptions for the operations team, trained supervisors and checked vehicle specifications.

Between 1985 and 1989, Strawser worked as a field foreman at LaBarge. Located in southwestern Wyoming near the Bridger-Teton National Forest, the LaBarge facility consists of a wellfield where gas is extracted and channeled through gathering lines, the Black Canyon Dehydration (DeHy) facility where water is removed from the gas, the Shute Creek processing facility where gas components are separated, and a 40-mile feed pipeline which transports the dry gas from the DeHy to Shute Creek.^{2/} The LaBarge gas deposit contains carbon dioxide, methane, nitrogen, hydrogen sulfide, and helium. In the concentrations present at LaBarge, hydrogen sulfide is deadly to humans and wildlife. Stipulation of Facts (Stip.) 1.

After completing and testing the 16 wells at LaBarge in 1986, Strawser performed final "check-outs" on equipment, checked and operated the computer system, coordinated contractors and Exxon's engineering and operations groups in order to avoid accidents including gas leakage, calibrated line break detectors on the dry gas trunk line, and eventually "started up" the facility without any gas leakage or other major problems. Hearing Transcript (T.) 44-52. Strawser also wrote contingency plans for emergency response in the event of gas leakage and trained operators to implement the plans. T. 53-56. As field foreman, Strawser implemented safety procedures, ensured compliance with Exxon policy, revised contingency plans, planned and conducted emergency response drills, and reviewed and approved work permits. T. 54-57, 73; R. D. and O. at 11. Strawser often worked unsupervised. *See* Stips. 2-5. Throughout his tenure at Exxon, Strawser

^{2/}(...continued)

with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards" 29 U.S.C. § 793(e). *See* 42 U.S.C. § 12117(b) (ADA).

^{3/} After the gas is processed at Shute Creek, gas products are shipped to market by pipeline and rail.

has received satisfactory to outstanding performance evaluations. R. D. and O. at 10-11. Strawser's attendance record is exemplary.^{4/}

In September 1989, Strawser was transferred to the position of field foreman at the Hartzog Draw Unit at Gillette, Wyoming. Strawser testified that while he suffered no reduction in salary or benefits, comparing the Hartzog Draw and LaBarge instrumentation is "like comparing a go-cart to a Mercedes Benz." T. 76. Hartzog Draw is merely an oil field whereas the computerized LaBarge facility "is on the cutting edge of technology." T. 83.

Exxon transferred Strawser pursuant to its 1989 Drug and Alcohol Policy. That policy provides that "an employee who *has had* or is found to have a substance abuse problem will not be permitted to work in designated positions identified by management as being critical to the safety and well-being of employees, the public, or the Company." Defendant's Exhibit (DX) 5 (emphasis added). Exxon's "Trainer Manual" states that "an employee who has been to or currently is active in rehabilitation is an employee who 'has had' or has a substance abuse problem" and would "not be permitted" to work in any position designated safety-critical. DX 6 at 221. The manual defines rehabilitation as "a structured process of counseling, education and therapy through which an employee seeks resolution of a personal problem with the abuse of alcohol or drugs." *Id.* at 222. Rehabilitation programs that preclude an employee from working in a designated position include "[p]articipation in self-help programs such as Alcoholics Anonymous, Narcotics Anonymous, or Cocaine Anonymous." *Id.*

The provision prohibiting employees from working in designated positions is known as the "never-ever" clause. Once an employee has abused drugs or alcohol, he is not eligible for a designated position regardless of rehabilitation. R. D. and O. at 4-6. The position of field foreman at LaBarge is a designated position because large concentrations of hydrogen sulfide are present. Exxon determined that Strawser "has had . . . a substance abuse problem" because he had undergone rehabilitation and was active in Alcoholics Anonymous (AA). T. 106-111, 499-500, 617. Specifically, in January 1981 Strawser was diagnosed as alcohol dependent and entered a 28-day treatment program. After a relapse, he returned for five days of treatment in August 1981. At the time of his transfer to Hartzog Draw in September 1989, Strawser had maintained sobriety since January 1, 1983 -- a period of nearly seven years.^{5/}

^{4/} Between 1982 and 1991, Strawser maintained a perfect record of work attendance. T. 105, Plaintiff's Exhibit (PX) 6. In 1992, he missed a day of work due to the flu. *Id.*

^{5/} During the five-day treatment program in August 1981, Strawser was diagnosed as having bipolar affective disorder, involving mood fluctuations manifested by periods of increased energy followed by depression and loss of energy. According to Dr. Michael Gendel, a psychiatrist, Strawser's alcoholism followed his bi-polar disorder chronologically, and the disorder may have precipitated the alcoholism. PX 65. *See* T. 394-397, PX 56 at 3-4. Dr. Ulysses S. Grant Peoples, a physician, and Dr. Walter Torres, a clinical psychologist, did not believe that the alcoholism and the disorder interacted. R. D. and O. at 15 and n.25. Strawser's bi-polar disorder is controlled with lithium. R. D. and O. at 9-10. Both Drs. Torres and Gendel testified that the disorder did not render
(continued...)

DISCUSSION

In order for individuals to recover under section 503 of the Rehabilitation Act, they must meet two different criteria which initially may appear contradictory. They must show first, that they are an individual with a disability and second, that despite their disability they can perform the particular duties required for the job. Strawser has shown in a number of different ways that he is an individual with a disability and that despite his disability he is capable of performing the particular duties of the job.

I. Qualified individual with a disability

Section 503 of the Rehabilitation Act provides that covered contractors and subcontractors “shall take affirmative action to employ and advance in employment qualified individuals with disabilities.” 29 U.S.C. § 793(a). Contractors and subcontractors also must otherwise treat qualified handicapped individuals without discrimination based on handicap in all employment practices such as “[e]mployment, upgrading, demotion or transfer . . .” 41 C.F.R. § 60-741.4.^{6/} Exxon is subject to these requirements. Stip. 15. For purposes of section 503, “the term ‘individual with a disability’ means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 29 U.S.C. § 706(8)(B). Also, to the extent that section 503 relates to employment, the term “individual with a disability” does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.^{29 U.S.C. § 706(8)(C)(v).}

A. Regarded as having a substantially limiting impairment

The ALJ found that Strawser was an individual with a disability because Exxon *regarded* him as having an impairment which substantially limited a major life activity. R. D. and O. at 26-27. We agree. An employee may fall under subpart (iii) of the definition if he has an impairment that does *not* substantially limit a major life activity, but the impairment is *regarded* as being substantially limiting. *See* S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N.

^{5/}(. . .continued)

Strawser unfit for duty in a high risk occupation.

^{6/} The ADA uses similar language. *See* 29 C.F.R. § 1630.4 (1995) (“It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to [h]iring, upgrading, promotion, award of tenure, demotion, transfer . . . [j]ob assignments, job classifications, organizational structures, position descriptions, lines of progression . . .”); 29 C.F.R. § 1630.5 (“It is unlawful for a covered entity to limit, segregate, or classify a job applicant or [an] employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.”).

6373, 6389-6390 (phrase includes persons who do not in fact have the impairment they are perceived as having as well as persons whose impairment does not substantially limit their life activities).^{7/} By including the “regarded as” criterion, “Congress acknowledged that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.” *School Board of Nassau County v. Arline*, 480 U.S. 273, 283 (1987).

Here, Strawser was diagnosed as alcohol dependent in 1981 and currently is a rehabilitated or “recovering” alcoholic. Expert witnesses at the hearing testified that Strawser’s alcoholism is “in remission.” T. 718-719, 908-909. See *Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989) (“Alcoholism is a handicapping condition within the meaning of the [Rehabilitation] Act.”). The impairment of alcoholism never affected the major life activity of “working,” however. R. D. and O. at 23-25 (“[T]he record indicates that [Strawser’s] work performance was not affected by his alcoholism.”). Exxon perceives the possibility that Strawser’s alcoholism could affect his work performance if he should suffer a relapse. In these circumstances, Strawser is regarded as having an impairment that affects employment.^{8/}

We note that an impairment may *affect* a major life activity without *significantly limiting* it. Special considerations apply when, as here, the major life activity is “working.” In this context, “substantially limits” means being restricted in the ability to perform either (1) a class of jobs or (2)

^{7/} Individuals also come within this category if they have an impairment which is substantially limiting only because of attitudes of others toward the impairment. For example, a job applicant’s facial scar may be substantially limiting because the prospective employer believes it will dissuade customers. Finally, an individual with no impairment may be regarded as having one that is substantially limiting. This circumstance would encompass discrimination based on a mistaken belief that an individual is physically or mentally impaired or on genetic information relating to illness, disease or disorders. Although questions may arise as to whether Strawser, whose alcoholism was diagnosed in 1981 and who completed rehabilitation within a year or two, still was impaired seven years later; the important consideration is Exxon’s perception.

^{8/} Contrary to Exxon’s contention, Congress clearly intended coverage of individuals treated for alcoholism. *Little v. Federal Bureau of Investigation*, 1 F.3d 255, 257 (4th Cir. 1993); *Teahan v. Metro-North Railroad Co.*, 951 F.2d 511, 518 (2d Cir. 1991), *cert. denied*, 113 S.Ct. 54 (1992); *Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985); *Rodgers v. County of Yolo Sheriff’s Dep’t*, 68 Fair Empl. Prac. Cas. (BNA) 155, 160 (E.D. Cal. 1995); *Burka v. New York City Transit Authority*, 680 F. Supp. 590, 597 (S.D.N.Y. 1988); *Whitlock v. Donovan*, 598 F. Supp. 126, 129-131 (D.D.C. 1984), *aff’d mem. sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986). See H.R. Rep. No. 1149, 95th Cong., 2d Sess. 22-23, *reprinted in* 1978 U.S.C.C.A.N. 7312, 7334 (Rehabilitation Act “protects otherwise qualified self-reformed or rehabilitated alcoholics . . . from unreasonable discrimination); *School Board of Nassau County v. Arline*, 480 U.S. at 285 n.14 (In excluding only alcoholics whose current use of alcohol prevented them from working or whose employment would constitute a direct threat to safety, Congress recognized that employers might have legitimate reasons not to employ alcoholics “but also understood the danger of improper discrimination against such individuals if they were categorically excluded.”). Cf. *Flynn v. Raytheon Company*, 868 F. Supp. 383, 385 (D. Mass. 1994) (coverage of alcoholics under ADA); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994) (same).

a broad range of jobs in various classes. *Dep't of Labor, OFCCP v. Texas Industries, Inc.*, 47 Fair Empl. Prac. Cas. (BNA) 18, 21 (June 7, 1988). Cf. 29 C.F.R. § 1630(j)(3) (1995) (ADA definition of “substantially limits” with respect to the major life activity of “working”). A “class of jobs” would include jobs requiring similar training, knowledge, skills and abilities, e. g., jobs requiring heavy lifting or jobs requiring the use of a computer. A “broad range of jobs in various classes” would include jobs *not* requiring similar training, knowledge, skills and abilities. 29 C.F.R. Part 1630, App. at 403. For example, fatigue could prohibit full-time employment, depression could restrict work in jobs requiring public interface, hearing sensitivity could affect work in noisy environments. The inability to perform a single, particular job does not qualify. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1101-1102 (D. Hawaii 1980) (substantial limitation means more than an inability to perform one particular job but less than a general inability to work; evaluation should focus on the number and type of jobs from which the employee is disqualified).

Exxon’s 1989 Drug and Alcohol Policy excluded Strawser from 1,800 jobs performed on multiple shifts by 3,000 employees. T. 1297, 1307. These jobs involved operating processes “where failure could cause a catastrophic incident” and where “[n]o direct supervision [was] readily available” R. D. and O. at 5-6. At LaBarge alone, the senior superintendent, the field superintendent, and all supervisors, field foremen, senior operators, and anyone who might relieve employees in any of these positions were designated safety-critical. T. 498. Although Strawser had been instrumental during set-up and was an experienced field foreman, all advancement opportunities at LaBarge were curtailed. *See* T. 194-195 (fellow field foreman received two-level promotion to senior superintendent at LaBarge after Strawser’s transfer). Within Exxon generally, designated positions include tank wagon driver, terminal operator, ship captain, offshore worker, pipeline worker and pilot. T. 1307-1308. A total of 52 out of about 700 or 800 executive positions at Exxon are designated positions. T. 1339. Strawser thus was restricted in the ability to perform a broad range of jobs in various classes and as such was significantly limited in employment.

Finally, the ALJ found that Strawser did not come within the statutory exception which denies protection to any alcoholic (1) whose *current* use of alcohol prevents him from performing the job in question or (2) whose employment, by reason of *current* alcohol abuse, would pose a direct threat to property or safety. 29 U.S.C. § 706(8)(C)(v).^{9/} “Direct threat” has been defined under the ADA to mean a significant risk of substantial harm to health or safety that cannot be eliminated or reduced by reasonable accommodation. Such a determination requires an individualized assessment of the person’s present ability to perform the essential function of the job safely. Factors germane to determining whether an individual poses a “direct threat” include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur and the imminence of the harm. *See* 29 C.F.R. § 1630.2(r).^{10/}

^{9/} We agree with Plaintiff that by expressly excluding only specified current alcoholics, this section recognizes that alcoholics not meeting the specifications are covered. *See* Plaintiff’s 8/7/95 Resp. to Supp. Briefs at 8-9.

^{10/} “An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others.” 29 C.F.R. Part 1630, App. at 409.

The record fully supports the ALJ's finding that Strawser did not come within the exemption, *i.e.*, that alcohol use or abuse did not affect his employment. Numerous co-workers, including the field superintendent at LaBarge, the operations superintendent at LaBarge and the field superintendent at Hartzog Draw, attested to Strawser's continuing sobriety. They testified that Strawser's alcoholism never affected his job, that they never had witnessed him using alcohol even at social events or on fishing trips, that he was always coherent and that he never manifested hangover symptoms. T. 426-470, 507-508, 522-523, 655-656. See R. D. and O. at 8 n.12. Strawser's own testimony, T. 94-96, 102, 290-291, 299, 507, in conjunction with that described above persuades us that he does not use alcohol currently. As to whether Strawser's employment in the capacity of field foreman at LaBarge would threaten safety, we adopt the ALJ's findings, based in part on expert testimony, that Strawser has made a strong recovery from alcoholism and that his risk of relapse is low.^{11/} R. D. and O. at 13-15, 17-21, 23-24, 36-38. Strawser therefore is an individual with a disability, *i.e.*, he is regarded as having an impairment which substantially limits a major life activity under 29 U.S.C. § 706(8)(B)(iii).

B. Having a record of a substantially limiting impairment

Plaintiff disagrees with the ALJ's finding that Strawser did not have a "record of" a substantially limiting impairment within the meaning of 29 U.S.C. § 706(8)(B)(ii). The ALJ found: "[A]lthough Strawser has a record of alcoholism, there is no evidence that this alcoholism substantially limited him in his major life activities. Specifically in regard to employment, the record indicates that his work performance was not affected by his alcoholism." R. D. and O. at 25. As Plaintiff points out, however, major life activities include activities other than "working." They are those basic activities that the average person in the general population can perform with little or no difficulty, *e.g.*, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting, reaching, thinking, reading, concentrating and interacting with others. *School Board of Nassau County v. Arline*, 480 U.S. at 281 (lengthy hospitalization established a history of disability); *Davis v. Bucher*, 451 F. Supp. 791, 795 (E.D. Pa. 1978) (substance abuse substantially impairs activities such as caring for oneself, performing manual tasks, walking, speaking, learning and working). See *Northwest Airlines v. Air Line Pilots Ass'n International*, 808 F.2d 76, 79 n.6 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988) (alcoholism is indicated where the "intake of alcohol is great enough to damage physical health or personal or social functioning" or where "alcohol has become a prerequisite to normal functioning").

^{11/} We agree with the ALJ that Strawser's single use of four ounces of alcohol during a hunting trip in October 1991, after eight years of abstinence, did not affect his employment. R. D. and O. at 37-38. See R. D. and O. at 8-9. The incident was a "lapse," as opposed to a "relapse," since it did not represent a return to alcohol dependency or abuse. See T. 376-378, 770-771 (Dr. Torres); T. 920-921 (Dr. Peoples); Gendel deposition at 76-77; R. D. and O. at 17 and nn.29,30. We also agree with Plaintiff that the incident ultimately demonstrated Strawser's control. He immediately listened to his AA tapes and upon returning to LaBarge admitted the lapse to his AA group and recommenced the 12-step program. Plaintiff's 12/17/93 Resp. to Defendant's Exceptions at 54.

The record in this case contains evidence that in the past Strawser's alcoholism affected major life activities other than working. In the late 1970's Strawser began drinking wine on a daily basis. When he sought help in late 1980, his consumption had increased to a pint of scotch a day. T. 88. He was charged with public drunkenness on a single occasion in 1979 or 1980. T. 102. Drinking affected his first marriage adversely. PX 56 at 2. In evaluating Strawser's history, Dr. Torres, the examining psychologist, noted: "The marital problems culminated in an acrimonious divorce in February 1980. [Strawser] observes that his drinking had aggravated marital problems, helped him tolerate an intolerable situation, generated guilt, loss of self-esteem and precipitated panic attacks." PX 56 at 2. Dr. Peoples, the examining physician, determined that Strawser met all nine criteria for alcohol dependence, "an illness that involves lack of control over alcohol intake." T. 898-899. See T. 325, 375-377; PX 91 at 3 (Strawser's drinking caused "alcoholic blackouts, tremors, withdrawal symptoms, drinking to relieve withdrawal symptoms and anxiety attacks while drinking").^{12/}

Perhaps most telling, however, is the diagnosis of alcoholism itself-- a professional judgment that Strawser's condition was sufficiently severe to require treatment. Treatment for alcoholism frequently is extensive and ongoing. Strawser, for example, completed rehabilitation programs during 1981 and 1982, including the initial program of nearly one month's duration. He continued AA activities thereafter. In this connection, the court in *Rodgers v. Lehman*, 869 F.2d at 259, stated: "[T]he nature of the disease of alcoholism requires that there be a continuum of treatment and that the alcoholic be permitted some opportunity for failure in order to come to the acceptance of his disease which is the critical element of his cure." Indeed, courts have not hesitated to designate alcoholism "a handicapping condition" without discussing the particular circumstances. *Little v. Federal Bureau of Investigation*, 1 F.3d at 257, citing *Rodgers v. Lehman*, 869 F.2d at 258. We find that Strawser is an individual with a disability under 29 U.S.C. § 706(8)(B)(ii) in that he has a record of an impairment that substantially limited major life activities other than "working."

C. Qualified individual

^{12/} Alcohol "dependence" is characterized by continuous drinking. In contrast, alcohol "abuse" generates dysfunctional behavior. See, e.g., *Rodgers v. Lehman*, 869 F.2d at 255 (alcohol abuse characterized by episodic or "binge" drinking -- excessive drinking followed by period of abstinence).

The ALJ found Strawser to be a “qualified” individual with a disability^{13/} because he had performed the job of field foreman at LaBarge successfully and safely for nearly five years prior to being transferred and continued to function as a field foreman at Hartzog Draw thereafter. R. D. and O. at 28-29. He thus was qualified to perform the job *without* accommodation. We agree and adopt this portion of the ALJ’s recommended decision.

Exxon argues that Strawser is not “qualified” because of the risk of harm in the event of relapse. Exceptions 22, 23, 25. In *School Board of Nassau County v. Arline*, the Court engaged in similar analysis when it considered whether a teacher suffering from the contagious disease of tuberculosis constituted a handicapped individual and, if so, whether she was “otherwise qualified” to teach elementary school due to risk of transmission. 480 U.S. at 280-288. Subsequently, Congress amended the Rehabilitation Act to exclude from coverage any individual “who has a currently contagious disease . . . and who, by reason of such disease . . . would constitute a direct threat to the health or safety of other individuals or who, by reason of the . . . disease . . . is unable to perform the duties of the job.” 29 U.S.C. § 706(8)(D). This amendment essentially codified the standard pertaining to performance and risk associated with this type of disability. Any individual not currently contagious or any individual not posing a direct threat to health and safety because of a contagious disease and able to perform the job despite the disease, was “qualified.”

Congress engaged in similar codification when it excluded from coverage only those alcoholics whose current use of alcohol prevented them from performing the duties of the job or whose employment, because of current alcohol abuse, posed a direct threat to others. 29 U.S.C § 706(8)(C)(v). As discussed above, Strawser was not excluded under this standard, and Exxon’s argument that he is not qualified fails. R. D. and O. at 28-29.^{14/}

We note that Exxon cites to *Arline* in arguing for categorical exclusion due to “unpredictable risk of relapse.” Exception 23. The inquiry in *Arline* was individual-specific, however. After finding handicapped a teacher whose remitted tuberculosis had become active, the Court proceeded

^{13/} Under section 503 of the Rehabilitation Act, a qualified handicapped individual is “capable of performing a particular job, with reasonable accommodation to his or her handicap.” 41 C.F.R. § 60-741.2. Under the ADA, a qualified individual with a disability “satisfies the requisite skill, experience, education and other job-related requirements of the employment position . . . and . . . with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m). Congress intended that standards under the Rehabilitation Act and the ADA be consistent. 29 U.S.C. § 793(e); 42 U.S.C. § 12117(b). The Rehabilitation Act regulations recently were revised to incorporate the “with or without reasonable accommodation” language. 41 C.F.R. § 60.741.2(t), 61 Fed. Reg. 19,336, 19,352 (1996).

^{14/} Exxon’s argument similarly fails under an alternative standard. Absent imminent risk of injury, the only material question is whether the individual is capable of performing the duties of the job. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1103 (“non-imminent risk of future injury . . . does not make an otherwise capable person incapable”). Strawser could pose an imminent risk only if he currently were abusing alcohol or if he were at high risk of relapse. He is neither. In this case, then, the issue of risk, *i.e.*, reasonable probability of substantial harm, pertains only to justifying job qualification requirements. See discussion, *infra*.

to the remaining question of job qualification. The Court stressed the need “to conduct an individualized inquiry and make appropriate findings of fact” if the Rehabilitation Act were “to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns . . . as avoiding exposing others to significant health and safety risks.” 480 U.S. at 287. Pertinent considerations included the nature, duration and severity of the risk and the probabilities that the disease would be transmitted and would cause varying degrees of harm. The exercise necessitated asking: How is the disease transmitted, how long is the carrier infectious, and what is the potential harm to third parties? *Id.* at 288. Medical evaluation of the teacher’s actual condition thus was required in order to determine whether the risk of transmittal rendered her “unqualified.” Exxon’s categorical exclusion of all individuals treated previously for alcohol abuse does not meet this individualized examination standard.

II. Job qualification requirements and individualized inquiry

Since Plaintiff established that Strawser was a qualified individual with a disability who was transferred because of that disability, Exxon must demonstrate that Strawser's continued employment in the designated position would pose a "reasonable probability of substantial harm." *Mantolete v. Bolger*, 767 F.2d 1416, 1422-1423 (9th Cir. 1985).^{15/} See *OFCCP v. CSX Transportation, Inc.*, Case No. 88-OFC-24, Ass't Sec. Rem. Ord., Oct. 13, 1994, slip op. at 17-20; *OFCCP and Thompson v. PPG Industries, Inc.*, Case No. 86-OFC-9, Dep. Ass't Sec. Dec. and Rem. Ord., Jan. 9, 1989, slip op. at 16-17. Pertinent considerations include the likelihood, imminence and severity of injury. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1104. Exxon's 1989 Drug and Alcohol Policy excludes from positions designated safety-critical any employee who has undergone treatment for alcoholism, thereby establishing a job requirement that screens out qualified individuals with disabilities. Accordingly, Exxon also must demonstrate that the requirement is job-related and consistent with business necessity and safe job performance. 41 C.F.R. § 60-741.6(c).

The ALJ found that Exxon "failed to demonstrate that its blanket policy precluding rehabilitated alcoholics . . . from holding designated positions, as applied to Strawser, is consistent with business necessity or safe performance of the job of field foreman" at LaBarge. We agree and adopt the ALJ's reasoning at pages 32-38 of the R. D. and O.

With regard to "reasonable probability of substantial harm," the ALJ identified the "risk" in the case as being: "[1] that Strawser would suffer a relapse, [2] that an emergency would occur, [3] that he as a result of drinking would take some inappropriate action (or fail to take appropriate action), and [4] that that action or inaction would cause a catastrophe." R. D. and O. at 36, *citing Dep't of Labor, OFCCP v. Texas Industries, Inc.*, 47 Fair Empl. Prac. Cas. (BNA) at 25-26 (this type of formulation represents a "tenuous prediction" which does not begin to approximate the analysis suggested by *E.E. Black, Ltd. v. Marshall*).

The ALJ found Strawser's risk of relapse to be low based in part on his past history. *Mantolete v. Bolger*, 767 F.2d at 1422-1423 (individual's employment history and medical history examined in assessing probability of harm). *Cf. OFCCP v. PPG Industries, Inc.*, Case No. 86-OFC-

^{15/} The court in *Mantolete* stressed that exclusion could not be based "merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports." 767 F.2d at 1422. Rather, the employer was charged with "gather[ing] all relevant information regarding the applicant's work history and medical history, and independently assess[ing] both the probability and severity of potential injury." *Id.* A comprehensive, individualized examination is required in order to "prevent employers from refusing to give much needed opportunities to handicapped individuals on the basis of misinformed stereotypes." *Id.* In addressing exclusionary standards, courts are charged with "determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives or whether they are simply conclusory statements . . . used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice." *Arline v. School Board of Nassau County*, 772 F.2d 759, 764-765 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987).

9, Ass't Sec. Rem. Ord., Jan. 9, 1989, slip op. at 22 (single best predictor of epileptic's future seizure control is past history). The ALJ cited expert testimony that "the longer a recovering alcoholic remains sober, the less likely he is to relapse." R. D. and O. at 37. At the time of transfer, Strawser had maintained sobriety for many years.^{16/} Additionally, Strawser had controlled his bipolar disorder successfully, had been forthcoming about the use of alcohol on the 1991 hunting trip, had been active in AA since 1980, and had "faced several major stressors in his life without suffering an alcoholic relapse."^{17/} *Id.*

Plaintiff relied on three experts: Dr. Walter Torres, a clinical psychologist, Dr. Ulysses S. Grant Peoples, a physician, and Dr. Michael Gendel, a psychiatrist. Drs. Torres and Peoples specialize in Addiction Medicine. They routinely perform fitness for duty evaluations for employees who work in high risk occupations.^{18/} Drs. Torres and Peoples examined Strawser and reviewed his history to determine fitness for duty predominantly in reference to alcoholism. Strawser was referred to Dr. Gendel, the psychiatrist, for a fitness for duty evaluation in reference to bipolar disorder. The evaluations consist of psychiatric testing, a physical examination, interviews and review of the employee's history. The evaluator then assesses the employee's ability to perform the job, any medical problems, occupational risks and risk of relapse. All of these experts testified that Strawser was fit for duty as field foreman at LaBarge, that his recovery was strong and that his risk of relapse was low. T. 378-381, 394-395, 680, 908-909, 916-918, 922, 924, 936-937, 1003, PX 54, PX 65, PX 91, Gendel deposition at 109 and exhibit 4. Dr. Peoples quantified Strawser's risk of relapse at between zero and ten percent. T. 937, 955-956, 973 (risk of relapse the same or less than the general population). *See* T. 869, 919, 923 (incidence of alcoholism in general population is about ten percent). The ALJ clearly credited this evidence.^{19/}

^{16/} The dictionary defines "sobriety" as "temperance or moderation" in the use of alcohol. "Sober" is defined as "temperate or sparing in the use of alcohol; not drunk." Strawser ceased using alcohol on January 1, 1983. He suffered a lapse during the October 1991 hunting trip when he took two or three swallows of alcohol. He testified that at a social function somebody might give him something alcoholic by mistake or he might pick up the wrong drink. It remains clear, however that the October lapse represented the only intentional instance of alcohol use in many years. There is no evidence that Strawser abused alcohol at any time after January 1983 by returning to alcoholic drinking. *See* T. 920-921 (alcoholic drinking is drinking accompanied by dysfunctional behavior such as continuing to drink or operating an automobile). In contrast, after Strawser ingested the alcohol, he returned to abstinence and his recovery program.

^{17/} These stressors included "his step-daughter's death, his step-son's [decision to live with his natural father], the transfer to Gillette, and his wife's severe depression" R. D. and O. at 17.

^{18/} Typically an employer will refer employees for an evaluation. Dr. Torres testified that he had evaluated pilots, air traffic controllers, doctors, nurses, anesthesiologists, railroad employees and employees at nuclear weapons facilities. Dr. Peoples testified that he had received referrals from the oil and gas industry and the construction industry. He also had evaluated doctors and lawyers.

^{19/} Exxon relied on the testimony of Dr. James Hayden, a physician specializing in Addiction Medicine. Dr. Hayden neither examined Strawser nor evaluated his fitness for duty. Rather, he
(continued...)

In assessing the probability and severity of potential harm, the ALJ stated:

The parties have stipulated that the severity of the harm in the event of a [hydrogen sulfide] leak is high. It could cause substantial injury to human life and the environment. The severity of potential harm is a factor which cannot be lightly dismissed. However, the probability of harm is very low. There has been only one leak at the DeHy since it opened in 1985. Strawser maintained eight years of sobriety with only one “relapse” which occurred off the job (while on a hunting trip) after his transfer. Moreover, there is no evidence that this drinking episode resulted in intoxication. . . . The remainder of Exxon’s “tenuous prediction” is contingent upon an emergency and a relapse occurring simultaneously. As the probability of an emergency and a relapse occurring separately is low, the probability of the two occurring together to result in inappropriate action and catastrophe is exponentially lower. . . . The probability of harm is reduced even further if Exxon monitors Strawser’s condition through periodic medical examination and random testing.

Id. at 38 (citation omitted). We agree with this assessment.

Exxon asserts that Strawser’s bipolar affective disorder exacerbates the risk of relapse. The experts disagreed on whether Strawser’s disorder interacted with his alcoholism. Dr. Gendel noted that the alcoholism followed the disorder chronologically and that the disorder may have precipitated the alcoholism.^{20/} Dr. Peoples observed that Strawser began taking lithium to control the disorder in 1981. Strawser stopped taking lithium in 1985 but resumed treatment in 1990 when symptoms returned.^{21/} Significantly, he did not also resume alcohol use during this hiatus. Strawser recalls experiencing symptoms of the disorder in college, but he did not begin drinking until many years later. Finally, Strawser relapsed during 1981 and 1982 after he had begun taking lithium. For these reasons, Dr. Peoples did not believe that the alcoholism and the disorder interacted in Strawser’s case. R. D. and O. at 15 and n.25. *See* T. 946 (Strawser’s alcoholism and bipolar illness are separate conditions). Dr. Torres agreed that a disorder-driven relapse was unlikely since none occurred when Strawser became symptomatic in 1990. T. 760-761.

^{19/}(...continued)

reviewed Exxon’s drug and alcohol policy and testified that it was “reasonable.” He also testified that no one “can accurately predict if or when the alcoholic is going to relapse.” T. 1184.

^{20/} Alcohol may be used to allay the manic aspect of the disorder. For Strawser, symptoms of the disorder included hyperactivity, accelerated speech, racing thoughts and a reduced need to sleep.

^{21/} Strawser stopped taking lithium after consultation with and upon the advice of his psychiatrist and with the understanding that his wife would monitor him for any returning symptoms. T. 89-93, 394-395.

Drs. Torres and Gendel testified that the disorder did not affect Strawser's fitness for duty. R. D. and O. at 15. The disorder is controlled effectively with lithium. *See* Gendel deposition at 117 (bipolar disorder is well-controlled and stable). Dr. Peoples testified:

I think [Strawser] understands the value of his lithium. He has been off his lithium for a while and understands now that it's important to take lithium. So I think the chances of his having a flare-up of his bipolar illness is low, and for that bipolar illness to then trigger drinking is very remote.

T. 1003. According to Dr. Gendel, Strawser has a particularly good understanding of the disorder and can be expected to detect any manifestation requiring a change in medication. Gendel deposition at 25, 115, exhibit 4. We are not persuaded, on this record, that the disorder exacerbates the risk.^{22/}

Exxon thus has not demonstrated that Strawser's employment as a field foreman at LaBarge would pose a reasonable probability of substantial harm.

Exxon asserts that because the potential for relapse purportedly cannot be predicted with any degree of certainty, alcoholics who have undergone rehabilitation should be excluded categorically from positions designated safety-critical. *See, e.g.,* Defendant's Exceptions 1, 21, 22, 48. The Institute for a Drug-Free Workplace, which filed a brief as *amicus curiae*, takes a parallel tack in arguing that the "potentially catastrophic consequences and liabilities" posed by employees with histories of substance abuse justify classification and exclusion. Brief at 12.

The Rehabilitation Act consistently has been construed as requiring examination of the *individual's* medical and employment histories. Determinations may not be premised on general medical reports "except in cases of the most apparent nature . . ." *Mantolete v. Bolger*, 767 F.2d at 1422 (complainant with epilepsy). *See OFCCP v. Yellow Freight System, Inc.*, Case No. 84-OFC-17, Acting Ass't Sec. Rem. Ord., Jul. 27, 1993, slip op. at 12 (interpreting *Mantolete* language to "refer to situations that are very clear, evident and obvious, and not subject to serious dispute"). *See also Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621-622 (9th Cir. 1982) (business necessity should not be confused with expediency). Thus, substitution of categorical exclusion for individual evaluation requires that all or substantially all of the individuals with the disability be unable to perform the job safely. *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993) (drivers with insulin-dependent diabetes mellitus or extreme vision impairment presented genuine substantial risk of injury as a matter of law under Federal and municipal medical standards for primary transportation jobs). *Cf. Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (absent proof that entire class of individuals is unable to perform a job, employer may exclude applicant only by showing individual incapacity).

^{22/} The circumstances in *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1087 (S.D.N.Y. 1993)(employee with bipolar disorder), are distinguishable. There, the plaintiff suffered repeated episodes of acute mental illness, including "substantial breaks from reality," while "under the care of a psychiatrist and receiving medication," which raised the possibility of future recurrence.

We disagree with Exxon's premise that a relapse is almost impossible to predict. The ALJ observed:

[T]he evidence establishes that alcoholics, unlike epileptics and diabetics, experience warning signs before they relapse; that the longer an alcoholic remains sober, the less likely he is to relapse; that job problems are the last to appear when an alcoholic relapses, and thus a progression toward alcoholic drinking can be detected long before any job problems appear.

R. D. and O. at 30. Both Drs. Torres and Peoples testified to this effect. T. 330-335, 388-393, 710, 917-918, 929-932; R. D. and O. at 13-15.

Dr. Torres testified that he attempts to determine whether an individual honestly has accepted his illness and realistically recognizes his vulnerability to relapse. He examines networks of relationships established to help protect against recurrence and the extent to which the individual is engaged in recovery activities, *e.g.*, whether he has "connected" with a sponsor and is attending support meetings. Factors suggesting relapse include glibness about the illness, bitterness, hostility toward supervisors, absenteeism, carelessness, depression, anxiety disorders, a tendency to "explain away" criticism and certain "con" behaviors. For Dr. Peoples, symptoms include marital, legal or physical problems, sleeplessness, arrogance and impulsiveness.^{23/}

The record in this case shows that while some portion of the population treated for alcoholism will return to alcohol abuse, many persons will maintain sobriety. T. 562, 567. The ALJ deemed relevant studies supporting the FAA's policy of returning rehabilitated pilots to work, which report a high rate of success. R. D. and O. at 20-21. As Plaintiff points out, other studies used undifferentiated populations, *e.g.*, "the unemployed, persons with mental disabilities, persons with physical damage from chronic drinking." Plaintiff's 12/17/93 Resp. to Defendant's Exceptions at 57; R. D. and O. at 40. In contrast, the FAA studies focused on commercial pilots recertified after remaining abstinent for two years and producing clinical evidence of recovery. R. D. and O. at 20. The pilots are comparable to Strawser, an engineer trained in gas production who has maintained sobriety for many years and continues an AA regimen. Plaintiff's Resp. at 57 and n.26. We also are persuaded by expert testimony pertaining to successful rehabilitation in the aviation and medical communities. T. 385-393, 688-713.

According to Plaintiff's Exhibit 95 (FAA information concerning alcohol monitoring program), the success rate for recovering pilots was 85.5% in 1985. The success rate in 1992 was 90-94%. "Success" was defined as having no relapses over a two-year period following return of medical certification. The exhibit explains that the FAA is responsible for issuing pilots medical certificates which document their medical fitness. Each pilot must have a current medical certificate to validate required piloting certificates. Alcoholics may not be certified. If, however, an alcoholic

^{23/} See *Altman v. New York City Health and Hospitals Corporation*, 903 F. Supp. 503, 510 n.8 (S.D.N.Y. 1995)(patient underestimated his disease, minimized the extent of his powerlessness over alcohol and drugs, did not recognize the consequences of a return to use; his understanding of the disease was superficial).

is rehabilitated sufficiently, he may be granted an exemption or “special issuance.” The FAA requires that a responsible medical source sponsor any request for a special issuance and imposes a period of surveillance following recertification. Once medical certification is restored, continued certification is contingent on maintaining abstinence and receiving favorable reports from monitoring sources during a 24-month period.

As of 1980, a pilot, appropriately sponsored, could return to duty three months after completing intensive rehabilitation, which typically consisted of a month-long program at an inpatient facility.^{24/} Outpatient aftercare also was required. The FAA’s Office of Aviation Medicine (OAM) states: “As a result of our experience, it has become evident that it is possible to make informed predictions about the future continued success of an individual’s rehabilitation at an early date after abstinence has been achieved and recovery has begun.” PX 95. Initially, the FAA required an extended period of abstinence -- between two and five years -- before exemption could be considered. With the advent of more aggressive rehabilitation, the period was reduced. The OAM states: “Active intervention techniques and vigorous professional treatments were beginning to result in a higher proportion of permanent remissions.” *Id.*

Reduction of the period between treatment and recertification promoted self-reporting because alcoholic pilots no longer faced the prospect of losing their licenses for an extended period. Dr. Torres testified that prior to the change in policy, for the period between 1960 and 1976, a mere 29 pilots reported themselves or were reported for alcohol dependency or abuse. After the period was shortened, the number of pilots increased to “580 plus pilots who had been identified as having an alcohol problem” between 1976 and the end of 1984. T. 691. Dr. Torres cited the difference in numbers as a basis for his opinion that Exxon’s policy of categorical exclusion offered a disincentive for “self-identifying” and seeking treatment. T. 705-706, 747. In this sense, the policy “adversely impacts safety.” T. 714 (Dr. Torres). The ALJ agreed that

there is no incentive under the policy for individuals who either (1) are in current need of rehabilitation, (2) have “self-reformed,” or (3) have undergone rehabilitation in the past, to come forward and identify themselves. [T]he choice for individuals . . . is to self-identify and be transferred to another job, or to play roulette and hope a random test does not identify them.

R. D. and O. at 33-34. Dr. Peoples testified that alcoholics comprise ten percent of the general population. T. 923. Of the 3,000 persons filling designated positions at Exxon facilities, only 40 individuals “had come forward with their alcoholism,” causing Dr. Peoples to question “what happened to the other 260” and “what [Exxon was] doing to . . . look at that problem.” T. 924.

The FAA studies, in conjunction with the expert testimony cited above, establish that successful rehabilitation is both possible and predictable. Exxon’s policy, however, removes an important incentive for achieving that rehabilitation.

^{24/} A report issued in 1985 by FAA’s Civil Aeromedical Institute states that in 80% of the cases special issuances (recertifications) were granted within a year of treatment. PX 95.

Exxon also asserts that the elevated relapse rates shown in some of the studies should obviate the need for individualized inquiry and that all individuals who *have had* a problem with alcohol should be precluded from filling safety-critical positions because relapse may be presumed. According to Exxon, 90% of all alcoholics relapse. T. 1146 (Dr. Hayden). This percentage derives from DX 48D^{25/} which states that “approximately 90 percent of alcoholics are likely to experience at least one relapse over the 4-year period following treatment.” T. 1154. Although the ALJ represented that OFCCP projected a relapse rate of between 50 and 70%, R. D. and O. at 40, he appears to have misinterpreted the pertinent testimony. Dr. Peoples testified “that after a 28-day or a month program of inpatient treatment, the average relapse in the first year or two, roughly 30 to 50 percent of people relapse, which means that the *success* rate is 50 to 70 percent success rate.” T. 919-920 (emphasis added). He later testified:

Ninety percent is the likelihood that after somebody has been in AA for five years, they have a 90 or 91 percent chance of remaining in AA and remaining abstinent. [T]he relapse rates that are quoted, that 50 to 70 percent that I said, the 50 to 70 percent success rates after treatment, that’s after the first year or the first two years. When you look at people who are able to maintain recovery over a sustained period of time, that’s the kind of person that was going to remain in recovery.

T. 935. Accordingly, we find that OFCCP set the rate of relapse at between 30 and 50%. The ALJ interpreted these “statistics [as] pertaining to individuals within the first year or two after treatment.” R. D. and O. at 40. While the precise period is unclear -- either during or after the first year or two -- suffice it to say that it constitutes an early stage of recovery.

Recovering alcoholics often fail initially. *Rodgers v. Lehman*, 869 F.2d 259 (the nature of the disease requires that the alcoholic be permitted some opportunity for failure in order to come to the acceptance of his disease which is critical to its cure). Indeed, Strawser relapsed twice during 1981 and 1982 following initial treatment^{26/} and thus would come within the above-referenced percentages. The real question, however, is whether an individual’s rehabilitation ultimately is successful. The studies establish a diminishing rate of relapse the longer abstinence is maintained,^{27/}

^{25/} DX 48D is a publication of the National Institute on Alcohol Abuse and Alcoholism, U.S. Department of Health and Human Services, entitled *Alcohol Alert*. The statement is attributed to a 1981 publication by John Wiley & Sons which does not appear in the record.

^{26/} Strawser testified (T. 95):

I was still having a hard time coming to the conclusion myself that I am an alcoholic and I can’t drink. . . . I graduated the top of my class in engineering, the top of my class in high school, president of the student body I had a hard time believing that I was an alcoholic. I just did. It took a little while to convince me. It took me a while, but I got convinced.

^{27/} DX 48J and PX 94 demonstrate that 77% of recovering alcoholics studied who were sober at two years also were sober at 10 years and that of those sober five or more years, 91% were likely to (continued...)

reinforcing expert testimony that “the longer a recovering alcoholic remains sober, the less likely he

^{27/}(...continued)

stay sober and in AA for another year. R. D. and O. at 19-21, 40. The FAA studies show success rates of 85.5% in 1985 and 90-94% in 1992, with “success” being no relapses over a two-year period following return of pilot medical certification.

is to relapse.” R. D. and O. at 37. For example, Dr. Torres testified:

[W]ith . . . sustained abstinence the individual . . . derive[s] more satisfaction in life through living sober, so living sober becomes prepotent over drinking. That is what happens over prolonged sobriety. That is why individuals who have been sober a long time tend to stay sober because they develop life satisfactions that are achieved and maintained through sobriety. [T]hey will lose these satisfactions if they go back to substance abuse.

T. 387-388. *See* T. 998-999 (Dr. Peoples) (program for recovering physicians requires two years of abstinence before medical practice may be resumed because the numbers show a “significant reduction in relapse rates” after the two-year mark). Since rehabilitation is shown to be possible, individualized inquiry is appropriate. Strawser has demonstrated a commitment to sobriety over a period of years.^{28/} His work and medical histories legitimately were examined to ascertain that he was fit for duty in a safety-critical position. Dr. Peoples testified:

All alcoholics . . . are not the same. There are differences, and there are ways to predict relapse. . . . You go through a person’s history. You look them in the eye. You challenge their history of drinking. You do a physical exam on them. You do blood tests if necessary. [Y]ou get a good history of how they’re proceeding through treatment, how they’re responding to therapy And you get thorough histories of job performance, family relationships, legal problems And by looking at all of those different factors, you come up with a judgment as to whether . . . someone is going to relapse or not. As I stated earlier, [Strawser] has a very low risk of relapse.

T. 917-918.

The ALJ’s analogy to *Davis v. Meese*, 692 F. Supp. 505, 511 (E.D. Pa. 1988) is apposite. There, “the FBI acknowledged that in the category of diabetics, there is a subgroup of individuals [non-insulin dependent diabetics] whose handicap does not pose the same risk as the others.” R. D. and O. at 38. Accordingly, the FBI considered those diabetics individually. The ALJ reasoned:

[I]t would appear that the same is true in this situation. Based on the strength of Strawser’s recovery and his commitment to continued treatment, it appears that he belongs to a subgroup of recovering alcoholics, namely those with a strong recovery, who can safely perform the designated job in question.

^{28/} When asked why he thought Strawser had remained sober, Dr. Torres responded: “[H]is mental status, his relatedness to others, his functioning on the job, his personal relationships.” T. 742. Larry Kennedy, the operations superintendent at LaBarge, testified that Strawser reportedly “spent a lot of his personal time donating to help other people and in fact volunteered at the prison to help people there [and] ultimately by providing counseling for others that helped him.” T. 656.

Id. at 38-39. In contrast, a “binge” drinker with no history of abstinence and only recently released from treatment likely would not be appropriate for high risk employment because a relapse would be difficult to predict. T. 389-391 (Dr. Torres). See *Altman v. New York City Health and Hospitals Corporation*, 903 F. Supp. 503 (S.D.N.Y. 1995)(risk of relapse unacceptably high where physician, who was a binge drinker, had been visibly inebriated while treating patients and only recently had undergone rehabilitation). This determination rests on an individualized assessment of the individual’s history, however.

The ALJ used many of the studies as “a frame of reference” but decided that they “ultimately [were] not conclusive for purposes of this case.” He faulted them for relying on self-reporting and noted that those which showed a high rate of relapse relied on data for “rehabilitated individuals during the first year or two after treatment.” R. D. and O. at 19, 40; T. 934-935, 1146; DX 48F. “Different studies often had conflicting results.” Compare DX 48C with DX 48F at 5 (conflicting rates of inpatient abstinence and relapse). He discussed DX 48I where 29 of 100 alcoholics had been abstinent for three years or more. The study was “significantly biased toward severity of illness,” DX 48I at 1148, meaning that of the individuals sampled, 87% had abused alcohol for ten years, 80% had undergone detoxification and 95% required drugs during withdrawal. He questioned whether the study was “representative of the general population of substance abusers . . .” R. D. and O. at 20.

DX 48J followed alcoholics for ten years after treatment. A total of 77% of the individuals reporting remission at two years also reported remission at ten years. DX 48J at 50. The criteria for remission permitted degrees of alcohol use, however. *Id.* at 48. PX 94, the AA study, also was long-term. Between 20 and 30% of the sample maintained more than five years of sobriety. PX 94 at 10. A total of 91% of individuals who maintained sobriety five years or more remained sober and active in AA for another year. *Id.* at 22. This study, which began in 1968 and ended in 1989, relied on “completed questionnaires for about 100,000 people.” T. 934. According to Dr. Peoples, however,

[i]t’s not a particularly well done study, but it does have very, very huge numbers in it. One of the problems with drug addicts and alcoholics is that you lose them to follow up -- you don’t have basically good ways of doing long term studies. You can study the first year, the first couple of years, but to get out to many years is a very difficult thing to do.

T. 933-934.

The ALJ ultimately concluded that this evidence “d[id] not appear reliable, as many of the studies introduced either contradict each other or are not representative of either the general population or of recovering alcoholics with histories similar to Strawser’s.” R. D. and O. at 40. See T. 919 (Dr. Peoples)(“One of the problems of many studies that are done on alcoholism is that they’re done on very skewed populations. They’re done on people off the street, or . . . on doctors, or . . . on individual groups that don’t necessarily apply to the entire disease.”). We also note that many of these studies are dated or rely on dated data and thus do not measure the results of more aggressive intervention techniques and treatments instituted in recent years.

In contrast, the ALJ considered the FAA studies to be relevant because they were grounded on an industry-wide monitoring program for recertified pilots. R. D. and O. at 20-21; PX 71 at 15, 20; PX 95. As discussed above, these studies show successful rehabilitation figures of 85.5% and 90-91%. The 1985 study included in its success rate pilots who required a second special issuance, meaning that they may have relapsed after treatment. A total of 79% of those receiving a special issuance had not relapsed since recertification, however. Dr. Torres testified that “[the monitoring program’s] success rate in maintaining long-term sobriety is quite impressive.” T. 710.

Although much of the “survey science” is problematic, we rely in part, as did the ALJ, on that which appears most reliable and relevant to Strawser’s circumstances, *i.e.*, the FAA studies. In Strawser’s case, we have access to his “behavioral science” contained in fitness for duty evaluations, and we rely on it also. Strawser’s history is comprehensive. At the time of transfer in September 1989, Strawser’s sobriety dated from January 1, 1983. After assignment to the LaBarge gas facility in 1985, Strawser spent five years working successfully and safely in a high risk occupation. At no time during his history with Exxon, beginning in 1981, did alcohol use or abuse affect his employment. A 90% relapse rate simply does not pertain to this individual at this stage of recovery.

Drs. Torres, Peoples and Gendel agreed. Dr. Peoples testified:

[Strawser’s] alcoholism is in remission. He is not drinking. He is working an active program. He is attending 12 step support meetings and has a support [system]. He has done activities that demonstrate his commitment to AA and to recovery. He also is taking his lithium for his bipolar illness. His recovery is very strong because of the strength of his commitment to recovery. My opinion basically is based on my history, my physical exam, my experience with other alcoholics, my review of . . . his medical records, his personnel file, letters that he has written. . . . From my research and from my examination of him, I feel that he has very little risk for relapse at this point.

T. 908-909. Dr. Torres testified similarly:

[Strawser is an individual] who is highly invested in recovery who has the resources to maintain his recovery, who has resources to deal with adverse situations. [H]is way of life is replete with influences, relationships, choice principles, values, beliefs, traditions and practices where sobriety is essential I see no evidence that he is disposed towards relapsing. He seems to have a very strong recovery, and that was observed as well by Dr. Gendel, by Dr. Peoples.

T. 775-776.

The dissent asserts that Strawser disclosed the continuing “allure” of alcohol by confiding to a psychiatrist his “strong desire for a drink.” As basis for the assertion, the dissent cites to PX 68 which includes a transcription of Strawser’s medical records covering 12 separate meetings. A November 1990 entry concludes: “Feels ‘a drink would be nice.’” In this entry, Strawser also related that he had filed the instant Rehabilitation Act complaint against Exxon, that he expected to look for

other employment and that he had experienced “a lot of anxiety, inner turmoil re[garding] this.” Dr. Torres testified that he had examined the “drink would be nice” comment in assessing Strawser’s fitness for duty. He also testified that the comment signified that “[Strawser] is honest, and he is observant of his relapse potential. He is not trying to look good to the doctor. He is letting it all out.” T. 407. In Dr. Torres’s opinion, the comment did not indicate “imminence of relapse.” *Id.*

The dissent also attributes Strawser’s request to be relieved from shift work to his “fear of alcoholic relapse.” In 1987 and early 1988, Strawser was assigned temporarily to the Shute Creek gas processing facility on a “shift work” schedule, *i.e.*, seven days on, seven days off, seven nights on, seven nights off. The assignment also involved a considerable commute. During this period, Strawser experienced severe chest pains and was diagnosed with viral pneumonia. He became dissatisfied with the assignment because it caused problems with his health and interfered with AA attendance. At his request, Strawser was returned to the field foreman position at the LaBarge DeHy in June 1988. Strawser’s physician was “concern[ed] that shift work posed a problem for [Strawser’s] health.” R. D. and O. at 4. Strawser explained to the supervisor at Shute Creek that although he did not currently have a drinking problem, he “didn’t want to take any chances.” T. 63. With regard to Strawser’s request to return to LaBarge, Dr. Torres testified: “[I]t shows good judgment [and] good problem solving skills in that he is aware that this kind of activity stands a significant risk of being detrimental to his recovery, and he took action on it. It is encouraging.” T. 405.

Strawser’s actions following the use of four ounces of alcohol during the 1991 hunting trip also demonstrate the strength of his recovery. Despite the fact that no one witnessed the lapse, Strawser reported it to his AA sponsor and support group immediately upon his return. He increased his AA activities and with the help of his sponsor “examined the reasons for his lapse and came to some understandings of what changes he needed to carry out in order to bolster his recovery.” T. 402 (Dr. Torres). Dr. Torres testified that Strawser’s “investment and his way of life is steeped enough in recovery that it . . . promotes continued recovery and . . . serves as a . . . very strong corrective should some drinking occur as it occurred that day.” T. 378. Dr. Gendel concurred:

[W]hen one is working with alcoholics in recovery, one learns that there is a point at which people reach a kind of self-sustaining recovery process where they are not working every day not to drink, where the recovery lifestyle is integrated, where the things that support recovery are part of everyday functioning and where, as in this case, a drinking episode is followed rapidly by . . . the use of the tools that support recovery, where it’s much more likely that someone will remain free of relapse, and [Strawser is] certainly in that group.

Gendel deposition at 100-101. Dr. Peoples testified that “[i]t does not take a real genius to look at somebody who [in] nine years has had four ounces of alcohol and basically come to the conclusion that he’s pretty unlikely to drink.” T. 918. What distinguishes Strawser is the capacity to integrate the tools of recovery into his existence. That other recovering alcoholics, who are responsible for elevated relapse rates present in some studies, may not share this capacity should not effectively render Strawser “disabled.”

Exxon asserts that no individual characteristic of a particular alcoholic will serve to reduce the relapse rates shown by the studies. Exxon also asserts that Strawser's work and medical histories are irrelevant and that the chances are between 30% and 90% that on any given day he will report to work impaired. These assertions belie both the expert testimony of Drs. Torres, Peoples and Gendel and common sense. If the relapse rate of any alcoholic really were a totally random 50%, for example, then the chance that Strawser will report to work impaired is the equivalent of a coin toss. Strawser reported to work unimpaired every single day since 1981 -- a period of nine years to date of transfer. This history translates to roughly 2,500 straight coin flips landing heads up. History notwithstanding, Exxon asserts that the chances are still 30-90% that Strawser will show up for work tomorrow impaired. We simply cannot agree. The most reliable predictor of how Strawser will perform his job tomorrow is how he performed his job over the past nine years.

The relevant FAA studies hardly substantiate categorical exclusion of all rehabilitated alcoholics from positions designated safety-critical. R. D. and O. at 40-41. Rather, categorical exclusion is an expedient means of avoiding any risk where individualized assessment would distinguish between those persons who have rehabilitated themselves successfully and those who have not. At bottom, Exxon's "never-ever" policy is based on a judgment that rehabilitated alcoholics are forever disposed to relapse, certainly a "myth, fear or stereotype" associated with alcoholism. In the instant case, the reality is contrary -- for an individual like Strawser who has maintained sobriety for years, any fear of relapse is not well-grounded.

We decline to abandon the section 503 requirement of individualized inquiry in these circumstances. R. D. and O. at 38-44. The *Exxon Valdez* notwithstanding, section 503 of the Rehabilitation Act mandates that Exxon not behave like the cat that sat on a hot stove. That cat will never sit on a hot stove again. Of course, the cat will never sit on a cold stove either. Section 503 requires an evaluation of the temperature of the particular stove, not just a blanket policy to avoid all stoves.

Finally, Exxon asserts that Strawser's transfer to a non-safety critical position constituted reasonable accommodation. To the contrary, the ALJ found that Strawser was qualified to perform the job of field foreman at the LaBarge, Wyoming, gas facility *without* accommodation. R. D. and O. at 28-31 (Strawser had performed the job successfully and safely for five years prior to transfer and continued to function as a field foreman at Gillette thereafter.).

Transfer to the Gillette oil field was discrimination, not "accommodation." Exxon regarded Strawser as being disabled, whereas in reality he was able to perform the job at LaBarge as well as any unimpaired individual with the requisite training and experience. These circumstances "are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic." *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995). The issue of whether the discrimination includes an employer's failure to make reasonable accommodation arises only where the disability "interferes with the individual's ability to perform up to the standards of the workplace . . ." *Id.* As the court in *Mantolite v. Bolger* recognized, "two questions must be asked," the first being whether the individual presently is "qualified to perform the essential requirements of the job without a reasonable probability of substantial injury to [himself] or others." 767 F. 2d at 1423. If the response to this question is

affirmative, “then employment cannot be denied based upon the handicap.” *Id.* Only if the response to the first question is negative does a second question concerning reasonable accommodation need to be asked. In Strawser’s case, and based on the instant record, the response to the first question clearly is affirmative and, therefore, responding to the second question is unnecessary.

We do not dispute that in other cases involving other individuals, accommodation may be required.^{29/} As Drs. Peoples and Torres testified, accommodation could include testing, monitoring, physical examinations, conversing with the rehabilitated individual’s family, reports from supervisors, continued treatment and a two-year sobriety requirement. R. D. and O. at 15-16. The key consideration here, however, is that “each case [must] be individually assessed to determine what type of monitoring would be necessary.” *Id.* Exxon’s policy of blanket exclusion does not achieve this result. Even Dr. Kenneth Gould, Exxon’s Director of Health Services, recommended individual evaluation and criticized Exxon’s policy for this omission. *See* T. 555-568. Dr. Gould recommended monitoring because he believed that some rehabilitated employees could return to designated positions if they demonstrated over a period of time that they were “capable of sustained performance free of substance abuse.” PX 100 at 2. *See* R. D. and O. at 16 and n.27. Tom McDonagh, Exxon’s Corporate Vice-President of Medicine and Occupational Health, agreed. T. 564-565; PX 101. Dr. Gould recommended “daily supervision by management for three months, to be decreased in a ‘step wise’ fashion based on behavior and negative testing for alcohol, monthly meetings, random testing and medical examinations, and peer identification.” R. D. and O. at 16 (footnote omitted).

An individual with a disability is responsible for informing the employer that accommodation is necessary. The regulations provide:

The contractor shall invite all applicants and employees who believe themselves covered by the Act and who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the Act and the regulations in this part. If an applicant or employee so identifies himself or herself the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate accommodation.

41 C.F.R. § 60-741.5(c)(1). *See* 41 C.F.R. Part 60-741, Appendix B at 203. Placing the responsibility on the individual empowers that person to decide whether he requires accommodation.^{30/}

^{29/} Neither do we question Exxon’s prerogative to administer a policy providing for unannounced searches for drugs and alcohol and requiring medical evaluations and alcohol and drug testing. We discuss this aspect of Exxon’s 1989 Drug and Alcohol Policy *infra*.

^{30/} If transfer to Gillette truly were an accommodation, Strawser legitimately could have refused
(continued...)

Here, Strawser never requested any form of accommodation in order to perform the job of field foreman at the LaBarge DeHy. Certainly Strawser never “requested a restructuring of the position which would require a substantial modification of essential job functions” as Exxon has argued. R. D. and O. at 31. Accordingly, this situation is readily distinguishable from those cases in which the employee starts the accommodation discussion by requesting from the employer a change in working conditions and the employer responds with an alternative accommodation proposal. Generally, at that point, the employer is authorized to choose a reasonable accommodation.

Exxon asserts that because an employer is entitled to choose the means of accommodation, it may choose to transfer Strawser rather than implement alternative accommodations recommended by the ALJ. See R. D. and O. at 29-32. On this record, however, the alternatives -- testing, supervisor evaluation and AA attendance -- did not require Exxon to change any employment practices or policies and thus no “accommodation” on Exxon’s part was necessary. Cf. 29 C.F.R. § 1630.2(o) (accommodations entail “modifications” or “adjustments” to the work environment or to the manner or circumstances under which the position held is customarily performed). As a field foreman at LaBarge, a position designated safety-critical, Strawser already was subject to drug and alcohol testing, both random and “for cause,” and to random searches. Exxon’s policy provides:

Exxon USA may . . . conduct unannounced searches for drugs and alcohol on owned or controlled property. The Company may also require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug use. Unannounced periodic or random testing will be conducted when an employee meets any one of the following conditions: has had a substance abuse problem or *is working in a designated position*, a position where testing is required by law, or a specified executive position.

R. D. and O. Appendix (emphasis added). Strawser’s performance was evaluated by his supervisor regularly. Both Drs. Torres and Peoples testified that Strawser needed little, if any, monitoring. R. D. and O. at 31. Dr. Torres testified: “I don’t believe that Mr. Strawser in particular needs to be monitored. His sobriety is very stable. His commitment to maintaining his lithium treatment is very stable. His responsiveness to directions from treatment personnel is stable.” T. 681. Dr. Torres also testified that Strawser was fit for duty in a high risk job, including a job that involved no direct supervision. T. 378-380. Strawser attended AA on his own time and without Exxon’s assistance. In short, Exxon was not required to make any modifications or adjustments “in its ordinary work rules, facilities, terms, and conditions” of employment to enable Strawser to work. *Vande Zande v. State of Wis. Dep’t of Admin.*, 44 F.3d at 542. Accordingly, Exxon was not entitled to choose the means of accommodation, *i.e.*, involuntary transfer, because Strawser did not require any accommodation.

^{30/}(...continued)

it, at least under comparable ADA regulations. 29 C.F.R. § 1630.9(d) (“A qualified individual with a disability is not required to accept an accommodation . . . which such qualified individual chooses not to accept.”) Of course, if the individual cannot perform the essential functions of the job without accommodation, he or she will not be considered “qualified.”

Even assuming that accommodation was required, involuntary transfer was not appropriate in this case. Rehabilitation Act section 503 contemplates accommodation in the particular job held by the employee unless business necessity or financial costs and expenses dictate otherwise. 41 C.F.R. § 60-741.6(d). Section 503 presupposes an interactive process between employer and employee in arriving at suitable accommodation. Under 29 C.F.R. Part 1630, the analogous ADA regulations, reassignment to a vacant position “should be considered only when accommodation within the individual’s current position would pose an undue hardship.”^{31/} 29 C.F.R. Part 1630, App. (Section 1630.2(o) Reasonable Accommodation) at 407-408. Furthermore, “reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay [and] status.” *Id.*

The ALJ found, in the alternative, that Exxon had not demonstrated that “accommodation” in the form of testing,^{32/} supervisor evaluation and continued AA attendance would constitute an undue hardship. R. D. and O. at 30-31. We agree that Exxon failed to make the requisite showing. Strawser thus would not be subject to transfer since reassignment should be considered only when accommodation in the current assignment would pose an undue hardship. Transfer to Gillette limited Strawser’s promotional opportunities and reduced his status from field foreman at a state-of-the-art gas facility to foreman at an oil field -- additional considerations militating against transfer.

III. Remedy

The ALJ recommended that Strawser be offered reinstatement to the position of field foreman at the LaBarge, Wyoming, facility with the seniority and pay he would have received had he not been transferred and that Exxon reimburse him for moving costs and the loss realized on the sale of his house. The ALJ rejected Plaintiff’s argument that Mrs. Strawser should be reimbursed for lost wages. We agree with and adopt these findings. R. D. and O. at 11-12, 44-45.

The ALJ declined to recommend any further action to abate the violation. Plaintiff excepts to the omission, arguing that Exxon should be directed to discontinue its policy of categorical exclusion. As Plaintiff points out, the Rehabilitation Act authorizes the Department of Labor to “take such action” on any complaint of noncompliance “as the facts and circumstances warrant, consistent with the terms of [the contractor’s] contract and the laws and regulations applicable thereto.” 29 U.S.C. § 793(b). Certainly an order directing Exxon to discontinue a policy that

^{31/} See 29 C.F.R. Part 1630, App. (Section 1630.2(p) Undue Hardship) at 408 which states: “The fact that [a] particular accommodation poses an undue hardship . . . only means that the employer is not required to provide that accommodation. If there is another accommodation that will not create an undue hardship, the employer would be required to provide the alternative accommodation.”

^{32/} Contrary to Exxon’s position, *e.g.*, Exceptions 9, 27-32, 39, 47, the record does not dispute that a testing program, if properly designed and implemented, would be effective. See, *e.g.*, T. 851, 982, 986, 1138. See also Part III, 49 C.F.R. Part 40, Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 59 Fed. Reg. 7340, 7345, 7367 (1994) (Drug and alcohol testing is feasible, accurate and effective.).

violates the affirmative action/nondiscrimination mandate of section 503 is an “action” which is “consistent with” the Rehabilitation Act.

The regulations implementing the Rehabilitation Act require contractors, as a condition of obtaining a government contract, to institute employment practices which are consistent with “the affirmative action obligation imposed by section 503” 41 C.F.R. § 60-741.6. To this end, OFCCP may require modification of existing practices. *Id.* Each contract must include an “affirmative action clause” which obligates the contractor to take affirmative action to employ and advance in employment qualified individuals with disabilities and to refrain from discriminating against such individuals on the basis of disability. 41 C.F.R. § 60-741.4. A noncomplying contractor must “make a specific commitment, in writing, to take corrective action to meet the requirements of the Act” before it can be found to be in compliance. 41 C.F.R. § 60-741.26(g)(2).^{33/} An order directing Exxon to “correct” the policy of categorical exclusion is an “action” which is “consistent with the terms of [its] contract,” specifically the affirmative action clause. 29 U.S.C. § 793(b).

Plaintiff also argues that the authority to order a party to cease discriminatory practices exists under analogous remedial legislation such as Title VII of the Civil Rights Act of 1964. *Dothard v. Rawlinson*, 433 U.S. 321, 331-332 (1977). *Cf. U.S. Dep’t of Labor v. Honeywell, Inc., and Teamsters Local 1145*, Case No. 77-OFCCP-3, Sec. Dec., June 2, 1993, slip op. at 30-34 (broad remedial authority under Executive Order No. 11,246 and 41 C.F.R. § 60-2.1).

The ALJ recognized that while Exxon “was attempting to deal with the problem of alcoholism and drug abuse in the workplace and the serious human and environmental damage that that problem can cause,” the nondiscretionary policy implemented to address the problem was “impermissibly inflexible.” R. D. and O. at 43. In particular, the “across-the-board policy prohibiting rehabilitated individuals from holding designated positions does not differentiate between those who have been successful in rehabilitating themselves and those who have not.” *Id.* at 43-44. It thus violated the section 503 “mandate of affirmative action and non-discrimination in employment,” and absent application of the policy “on a case-by-case basis,” Exxon risked future violation. *Id.* at 44.

The ALJ noted, however, that implementation of the policy in conformance with certain of Exxon’s directives could permit individualized inquiry. The directives state that any employee working in a designated position must report “1) past, present or future alcohol or substance abuse, including participation in rehabilitation programs; 2) arrests or traffic tickets received while under the influence of alcohol or drugs; 3) arrests for public intoxication, possession, sale or distribution of controlled substances; and 4) any other incident involving alcohol or drugs.” *Id.* at 42. The ALJ observed:

^{33/} OFCCP is authorized to take action, *e.g.*, contract cancellation or termination, in whole or in part, and debarment, in the event that a contractor fails to comply with the affirmative action clause. 41 C.F.R. §§ 60-741.27 and 60-741.28.

It appears from these directives that, based on factors such as how long ago the incident occurred, how many incidents there were, and what job the employee held at the time of the incident, an employee with a substance abuse history could nevertheless be retained in a designated position. . . . Exxon nevertheless has contended throughout this proceeding that Strawser's transfer out of his designated job was required under the 1989 policy. Regardless, it is clear that no thought was given to maintaining Strawser in his designated position at [the] DeHy when the policy was implemented.

Id. at 42-43.

Individualized inquiry would not be burdensome. Of the 3,000 employees working in designated positions, "if they reflect the population as a whole, approximately 10% will be alcoholic." R. D. and O. at 42. Because of Exxon's pre-employment screening, the percentage may be less. (According to Exxon, only about 40 employees were transferred when the policy took effect.) Exxon would be required to evaluate only the individuals whom it knew to have histories of substance abuse, rather than all 3,000 employees filling designated positions. *Id.*

In these circumstances, we deem it appropriate to direct Exxon to discontinue the policy of categorically excluding individuals with a history of alcoholism from consideration for designated positions.

CONCLUSION

We find that Complainant Thomas Strawser is a qualified individual with a disability under section 503 of the Rehabilitation Act and that Defendant Exxon Corporation, d/b/a Exxon Company, U.S.A., failed to demonstrate that its 1989 Drug and Alcohol Policy, as applied to Strawser, is consistent with business necessity and safe job performance. Exxon thus violated section 503 of the Rehabilitation Act when it precluded Strawser from working in the designated position at issue.

Exxon is ordered to offer Strawser reinstatement as field foreman at the facility in LaBarge, Wyoming, with the seniority and pay he would have received had he not been transferred to Gillette, Wyoming, in 1989 and to compensate him for costs attendant to his return and for the loss realized on the sale of his house.^{34/} Exxon also is ordered to refrain from discriminating against Strawser with respect to employment decisions, including promotions, involving designated positions for which he is qualified. Finally, Exxon is ordered to discontinue that portion of the 1989 Drug and Alcohol Policy categorically excluding any individual who "has had" a problem with alcohol from designated positions.

^{34/} The loss on the sale of the house was directly attributable to the unlawful decision to transfer Strawser to Gillette, Wyoming, and thus is compensable in order to restore him to the position he would have occupied had the discrimination not occurred. *Compare Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Deputy Sec. Rem. Ord., Feb. 14, 1996, slip op. at 26 (loss not compensable where unlawfully discharged employee would not have been reimbursed at time of employer's subsequent relocation and where amount was not adequately documented).

If, within sixty (60) days of this order, Exxon fails to comply with any provision of the order, all of Exxon's Federal and federally-assisted contracts and subcontracts shall be canceled and Exxon, its officers, subsidiaries and successors, shall be ineligible for the award of any Government contracts or subcontracts, and shall be ineligible for extensions or other modifications of any existing Government contracts or subcontracts, until Exxon has satisfied the Assistant Secretary of Labor for Employment Standards that it is in compliance with the provisions of section 503 and the rules, regulations and orders issued thereunder which have been found to have been violated in this case.

SO ORDERED.

DAVID A. O'BRIEN

Chair

JOYCE D. MILLER

Alternate Member

Member Karl J. Sandstrom, dissenting:

This case presents the Board with the difficult task of identifying the unobvious point where the law strikes the balance between public safety and the rights of disabled individuals in the workplace. Where one yields to the other is a not a question committed to the Board's discretion. Rather, our task is to examine the statute and its regulations in the light of the case law and determine what the law requires of employers in choosing between competing public demands. If the law permits an employer to take one course of action, even if our judgment is that the public would be better served by a different employment practice, our obligation is to affirm the employer's decision. For the reasons more fully given below, I depart from the Board's decision because I find that the law affords employers more leeway in making these decisions than the Board recognizes.

I begin my dissent in agreement with the Board's finding that Complainant is for the purposes of Section 503 of the Rehabilitation Act an "individual with a disability." Even without taking into consideration Complainant's bi-polar disorder and its connection to or influence upon Complainant's alcoholism, Complainant's history of alcoholism alone is sufficient to establish that he is an individual with a disability. *See Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985) (a recovered alcoholic is an individual with handicaps within the meaning of the Rehabilitation Act). That alcoholism is a serious disease that can substantially impair an individual's mental and physical functioning is beyond dispute. Exxon offered substantial and unrefuted scientific evidence on this very point. *See DX 48G, 48H and 48MM*. It is then somewhat disingenuous for Exxon to contend that it does not consider Complainant's alcoholism to be a covered disability. The fact that Exxon does not consider alcoholism to be a disqualifying condition for non-safety related jobs is better evidence of its general compliance with its obligation under the Rehabilitation Act than it is proof that it does not consider alcoholism to be a disability. Regardless of whether Exxon considers

alcoholism to be a disability, it is well settled for the purposes of Rehabilitation Act that it is a covered disability. *Teahan v. Metro-North Commuter Railroad Company*, 951 F.2d 511, 517 (2nd Cir. 1991).

Because I find that alcoholism can manifest itself in the substantial impairment of physical and mental functioning, I find no reason to conclude that Complainant was a covered individual with a disability because Exxon *regarded* him as having a disability. Complainant is a covered individual because he suffers from the disease of alcoholism. Complainant's admirable and sustained efforts to control his alcoholism only underscore the terrible and persistent nature of this disease. To suggest, as the majority does, that Complainant is a covered individual largely because Exxon regarded him as such is to diminish Complainant's own efforts to control his disease and Exxon's legitimate public safety concerns. Once it is established that an individual suffers from a disability, there is no reason to proceed with an analysis of whether the defendant regarded the individual as disabled. At this point of the analysis, defendant's state of mind is irrelevant. The focus instead should turn to second step of the required legal analysis and whether the individual is "otherwise qualified" with or without reasonable accommodation. *School Board of Nassau County, Florida, et al v. Arline*, 480 U.S. 273, 287 (1987).

It is at this stage of the analysis that I part company with my colleagues. The majority has concluded that Complainant must be permitted to return to his previous position without the imposition of any accommodation. I question the confidence with which the majority issues this finding, because immediately upon rendering it, the majority notes Exxon's failure to demonstrate that an accommodation by means of testing, supervisor evaluation and continued AA attendance would constitute an undue hardship. Why even suggest an accommodation where none is necessary unless one entertains doubts about the initial determination. Inasmuch as the majority later in its decision concludes that Complainant could refuse the imposition of any accommodation, Exxon is left to wonder why the Board would speculate about an accommodation which the company could not legally impose. Because I believe the majority's decision is constructed on a very shaky legal and factual foundation, I suspect that the majority speculates about possible accommodations because it fears that its finding that no accommodation may be imposed on Complainant may be upset on appeal. A review of facts of this case demonstrates why such fears would be well grounded.

Complainant was employed by Exxon as a Field Foreman at a major natural gas field in Wyoming. In this largely unsupervised position Complainant was responsible for the development and -- in the event of an accident -- the implementation of contingency plans to protect the safety of the personnel working at the plant and the people of the surrounding community. It is undisputed that an accidental leak at this field could result in a major disaster, endangering the health and lives of the people working there and those living in the surrounding area. Nor is it disputed that Complainant's position was critical to the prevention and containment of such accidents. Concededly, the possibility of such an accident was remote if for no other reason than such fields would not be legally allowed to operate if they posed an imminent threat to the public safety. For that matter, the accident at Three Mile Island prior to its occurrence would have been deemed a remote possibility. It is the catastrophic consequences not the likelihood of an accident that justify great and costly precautions in these situations.

Complainant is a recovering alcoholic. He was first diagnosed to be an alcoholic in 1980. Two of his siblings are also alcoholics. He began receiving treatment for his alcoholism in 1981. Complainant entered a treatment center in 1981 for a twenty-eight day program and became active in Alcoholics Anonymous. Complainant continued to experience difficulty in achieving sobriety. His AA sponsor noticed that he exhibited certain manic tendencies and speculated that these tendencies might have been contributing to his inability to achieve sobriety. At his sponsor's suggestion, he reentered the center for a five day treatment program. During treatment for his alcoholism, Complainant was diagnosed as suffering from bi-polar disorder, which is also known as manic depression. His physician prescribed lithium to control his manic depression and to aid in his quest for sobriety.

There is some evidence that Complainant's bi-polar disorder may have triggered his alcoholism.^{35/} In any event, Complainant was able to achieve sobriety in January 1983 while on lithium.^{36/} When Complainant moved to the LaBarge in March 1985, he chose to discontinue taking lithium. Despite discontinuing his lithium treatment, Complainant was able to sustain sobriety while at LaBarge. Complainant continued his attendance at AA meetings and followed AA precepts while at LaBarge. His fear of alcoholic relapse did lead him to request along with his doctor that Exxon accommodate him by taking him off shift work. Exxon honored this request. When his manic symptoms reappeared in 1990, Complainant sought medical advice and was put back on lithium. He remains on lithium to this day. During his treatment, he disclosed to his doctor the continuing allure of alcohol. Complainant also admits to drinking during the pendency of this case while on a hunting trip in October of 1991.

Under these facts, I am unable to find that Complainant without accommodation is to be considered as a matter of law to be otherwise qualified under section 504. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). This includes any requirement reasonably designed to protect the public safety. As the Fifth Circuit held in *Chiari v. City of League City*, 920 F.2d 311, 316 (5th Cir. 1991): "a significant risk of personal injury can disqualify a handicapped individual from a job if the employer cannot eliminate the risk."

In *Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922 (5th Cir. 1993), the circuit court had occasion to expand upon its analysis of the relationship between safety demands and a finding that a person is "otherwise qualified." The case involved a surgical assistant who, upon revealing that he was HIV positive, was transferred to another position in the hospital. In upholding the transfer from a challenge under the Rehabilitation Act, the court found, at 924:

While the risk is small, it is not so low as to nullify the catastrophic consequences of an accident. A cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician with Bradley's responsibilities not "otherwise qualified."

^{35/} Testimony of Dr. Michael Gendel, PX 65, T. 394-397.

^{36/} Complainant admitted to mistakenly having a few sips of alcohol at social events between January 1983 and October 1991 when he concedes a more significant lapse. T. 252-253

These cases are in accord with the regulations implementing Section 501 of the Rehabilitation Act which define a “qualified handicapped person” as one who “can perform the essential functions of the position in question without endangering the health and safety of the individual or others” *C.f.* 29 C.F.R. § 1613.702(f).

Measured against this standard, I believe Exxon is fully justified in conditioning Complainant’s continuing employment on his acceptance of a reasonable accommodation designed to satisfy Exxon’s legitimate safety concerns. Although it is undisputed that Complainant’s education and experience provide him with the requisite skills to function as a field foreman, and the record demonstrates that he has done so for five years in an exemplary manner, the risk of relapse remains ever present, as do the catastrophic consequences that could accompany an accident attended to by an individual in an impaired condition. Exxon has an obligation, as did the defendant in *Altman v New York City Health and Hospitals Corporation*, 903 F. Supp. 503 (1995) (Hospital refused to reinstate alcoholic physician as Chief of its Department of Internal Medicine), “to weigh carefully the public safety concerns that an undetected relapse might entail.” at 509.

In finding that Complainant requires no accommodation, the majority largely ignores the testimony of Complainant’s own consulting experts. Dr. Torres testified that Complainant should be monitored by his supervisors, should be subject to random testing, should be required to attend AA meetings and continue under psychiatric care. (T. 686-689). Dr. Peoples similarly recommends alcohol and drug screening and monitoring. (T. 997-1002). Lastly, Dr. Gendel, who was consulted regarding the issue of bi-polar disorder in relationship to Complainant’s alcoholism notes the need for monitoring and psychiatric treatment. (PX 65). These recommendations are rooted in a recognition that even though an individual with bi-polar disorder may have his alcoholism under control, there is no cure for either alcoholism or bi-polar disorder. Continuing attention is therefore required and in those instances where public safety is implicated, employer action is necessary.

In *Hogarth v. Thornburgh*, 833 F. Supp. 1077 (S.D.N.Y. 1993), the court was confronted with the question whether the F.B.I. could terminate a clerk suffering from bi-polar disorder if his condition were controllable with medication. Judge Francis wrote at 1083:

The second consideration -- the probability of a relapse -- also favors the Government. Mr. Hogarth’s psychiatrist testified that once his condition had been controlled with medication the chances of a recurrence were minimal. The Government successfully rebutted this argument in several ways. First Dr. Siegle testified that lithium therapy is no longer viewed as a guarantee against recurrence of bipolar disorder as it once was. Second, the effectiveness of any regimen of medication depends on the patient’s compliance.

On this basis, along with evidence of Mr. Hogarth’s post-termination relapse, the court found the plaintiff was not “otherwise qualified”. In the instant case Exxon did not terminate Complainant but seeks only to impose certain accommodations to protect the public safety on his continuing employment.

To find that Complainant requires no accommodation, the majority must downplay the significance of Complainant's volitional use of alcohol during the pendency of this matter. According to his own testimony, Complainant's resort to alcohol was the result of stress or in his own words "everything just got to me . . ." (T. 255). I cannot agree with the majority that Complainant's "lapse" ultimately demonstrated his control. For me it demonstrates the continuing allure, particularly in times of stress, that alcohol holds for him. This conclusion is supported by other actions of Complainant. To aid in his recovery, Complainant upon doctor's advice, sought relief from shift work, a request which Exxon honored. In November 1990 Complainant confided to his doctor his strong desire for a drink. (PX 68). At that time his physician ordered additional medication to control his tension and anxiety. It is clear then from the evidence that Complainant's recovery is not complete. Under the circumstances Exxon's effective options are limited. Exxon is unable to determine the amount of stress in Complainant's life or guarantee Complainant's compliance with his recovery plan; therefore, to protect the public and its employees, Exxon is restricted to taking those actions that are within its control.

Exxon's fear of relapse is not baseless. Although the risk of relapse cannot be precisely quantified, the best available science strongly suggests that Exxon's fear is well grounded. The studies introduced in the hearing below document the risk. Exhibit 48D, the October 1989 edition of *Alcohol Alert*, published by the National Institute on Alcohol Abuse and Alcoholism reports: "There is evidence that approximately 90 percent of alcoholics are likely to experience at least one relapse over the 4-year period following treatment. Despite some promising leads, no controlled studies have shown any single or combined intervention that prevents relapse in a fairly predictable manner." It goes on to report on a study that "revealed that most relapses were associated with three high risk situations: (1) frustration and anger, (2) social pressure and (3) intrapersonal temptation." I would note that each of these risk factors is largely beyond an employer's ability to control. A second study, Exhibit 48F, recites the results of a Rand Corporation study that found among the alcoholics who received treatment and were followed "that only seven percent of men abstained throughout the course of the study's four year follow-up."

The risk of relapse is also well documented in Exhibit 48I, a study by Dr. George Vallant of Dartmouth Medical School. His study, one of the few prospective studies on relapse, found that 95 percent of the alcoholics who received treatment and then were followed resumed drinking at some point during the eight year follow-up. He also concluded that "to a remarkable degree, relapse occurs as independent of conscious free will and motivation." Even the studies relied upon by Complainant support a finding that the risk of relapse is substantial. For alcoholics who remain active in AA, only twenty to thirty percent were able to maintain sobriety for five years. (PX 94). Of those who reported five years of sobriety, nine percent of those who remained active in AA relapsed in the sixth year. As the record demonstrates, these studies tend to err on the low side in calculating relapse because of the reliance of the studies on self-reporting. Only about fifty percent of those interviewed are truthful about their consumption of alcohol. (T. 1148). This fact alone is a good reason why Exxon in this case should not be compelled to rely on a complainant's good faith compliance with his recovery program.

As serious as the risk of relapse is among the general population of alcoholics, the evidence suggests that it is heightened in persons suffering from bipolar disorder. (DX 48L, M and N). Based

on these studies and the hearing record, I find Exxon's fear of relapse to be well substantiated. I do not dispute that decision makers and employers among them could benefit from studies that more precisely identified individual characteristics that were implicated in relapse. Regrettably, the science has not progressed to that stage. The question then becomes: absent such evidence, is an employer when confronted by a substantial public safety concern compelled to rely on the unvalidated by scientific study recommendations of consulting psychologists? In light of the potentially catastrophic consequences of a wrong decision, uncertainty calls for prudence. An employer is given latitude in these circumstances. *Huber v. Howard County*, 849 F.Supp. 407, 414 (Md. 1994). Therefore, I conclude Exxon could reject the opinions of the consulting witnesses in this case in favor of the available science and condition Complainant's continued employment on his acceptance of a reasonable accommodation.

My colleagues suggest the law is otherwise and Complainant was denied the individualized assessment that the law requires. I respectfully disagree. As the court in *Carr v. Reno*, 23 F.3d 525, 530 held: "'individualized inquiry' need be no more extensive than the facts of the case demands." Because the most compelling facts of this case (*i.e.* those validated by scientific study) place Complainant in a population that is at significant risk of relapse, Exxon was not required to reject the available scientific evidence in favor of the more subjective evaluations of Complainant's consulting witnesses. Complainant's individual medical history does not rescue him from the population that is at risk, rather it encumbers him with some of the very characteristics that suggest an elevated risk (*e.g.* family history of alcoholism, bipolar disorder, previous relapses and continued craving.) Complainant's admirable battle with alcoholism suggests that he is currently winning in this struggle, but it is the never ending nature of that struggle that permits Exxon to impose certain accommodations on his continued employment. Again it is instructive to note that Complainant's own witnesses suggest certain accommodations would be appropriate.^{37/}

The majority is correct in noting that in most cases individual inquiry into whether an individual can perform the essential function of a job is required before a person may be denied employment. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). This obligation is particularly pronounced in instances where an individual's current capacity to perform a job is at issue. Often in these cases a test can be devised to evaluate whether or not an individual is capable of performing the particular physical and mental tasks required by a job. This obligation is necessarily different when evaluating a job qualification that is directed towards latent risk as opposed to current capacity. Inherent in risk assessment is a reliance on use of general characteristics shared by the population being evaluated. The very purpose of risk assessment is to identify general characteristics that can be demonstrated by proper study to have predictive value (*i.e.* capable of explaining a particular outcome). The case law demonstrates that the demands of individual inquiry are very different when the goal is to identify acceptable level of risk.

In *Chandler v. The City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), the circuit court upheld a challenged Federal Highway Administration regulation prohibiting insulin dependent diabetics and

^{37/} While conceding that monitoring and supervision is generally appropriate, Complainant's witnesses did not concede that Complainant's medical history justified him being separated out for special attention.

individuals with corrected vision of less than 20/40 from being employed as Primary Drivers.^{38/} While expressing “hope that medical science will soon progress to the point that ‘exclusions on a case by case basis will be the only permissible procedure, or hopefully, methods of control may become so exact that insulin-dependent diabetics will present no risk of ever having a severe hypoglycemic episode,’” the court upheld the blanket exclusion of the regulations. *Chandler*, at 1394.

Similarly, in *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991) the petitioner, a truck driver with a history of epilepsy but who took anticonvulsant drugs and had been seizure-free for seven years challenged a Department of Transportation regulation that prohibited persons with a history of epilepsy from driving trucks in interstate commerce. Although conceding that the risk of someone like the petitioner having a seizure while driving was very low, the circuit court upheld the regulations pending further general studies and investigations, “designed to turn up general features tending to show greater or lesser, degrees of risk.” *Ward*, at 164.

I find Judge VanArtsdalen’s discussion of this issue in *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988) particularly persuasive. At issue in that case were the regulations of the Federal Bureau of Investigation which excluded insulin-dependent diabetics from applying for positions as special agents or investigative specialists. At 517, Judge VanArtsdalen responds to an argument very similar to Complainant’s:

Plaintiff argues that determination of who, among the insulin-dependent diabetics, is or is not qualified must be made on an individualized case-by-case basis. The difficulty with this seemingly logical solution is that there exists no reliable method of determining in advance those insulin-dependent diabetics who do not present a substantial risk of having a sudden and unexpected severe hypoglycemic episode while on a duty assignment. The experts agreed that under certain circumstances which might arise while on a duty assignment, any insulin-dependent diabetic would be at risk of having a severe hypoglycemic occurrence. There are tests, such as the insulin infusion test, which are helpful in predicting those more likely to have severe hypoglycemic occurrences and also helpful in predicting those more likely to have frequent and recurring severe hypoglycemic occurrences. However, the evidence fails to establish that any known technology may, on any individualized case-by-case basis, reliably predict the probability or frequency that any individual insulin-dependent diabetic would have a sudden and unexpected severe hypoglycemic occurrence in the future. No known method establishes, within reasonable medical certainty, that the risk as to any individual is nonexistent, minimal or even very small, or any basis to quantify such risk in any and all situations reasonably likely to occur on the job.

Faced with the medical uncertainty, Judge VanArtsdalen concluded that deeper individual inquiry was not required.

^{38/} A Primary Driver is an employee who drives on public roads as an intrinsic part of his or her job duties.

Collectively these cases stand for the proposition that individual inquiry need be no more extensive than the current state of medical knowledge justifies. When confronted with specter of catastrophic loss, an employer need not ignore the available science in favor of the more impressionistic judgments of consulting witnesses.^{39/} These judgments however well bolstered by professional experience remain conjectural until or unless validated by scientific study. The risk of error on the part of a consulting psychologist is not one that an employer is legally required to assume. If I am correct that this is the law in the above refusal to employ cases, I would suggest that the standard in cases like the instant one in which an employer seeks only to impose certain accommodations on continuing employment would certainly be less stringent. Consequently, I would find that in light of the risk that the unaccommodated employment of Complainant as a gas field foreman would pose to the public safety that Exxon as a matter of law may impose accommodating conditions on his continued employment.^{40/}

The majority suggests that even if it were to concede that Exxon was within its rights to impose an accommodation on Complainant, Exxon's choice of accommodation was not justified. For a number of reasons, I find that conclusion unsupported. First, the case law is clearly to the contrary. The ultimate discretion to choose the specific accommodation accorded an employee lies with the employer. See *Vande Zande v. Wisconsin Department of Administration*, 851 F. Supp. 353, 359-360 (W.D. Wisc. 1994), *Kuehl v. Wal-Mart Stores, Inc.*, 909 F. Supp. 794, 802 (Col. 1995), and *Kerno v. Sandoz Pharmaceutical Corporation*, No. 93 C 20112, 1994 U.S. Dist. LEXIS 13265 (N.D. Ill. 1994).

Second, the accommodation offered by Exxon was on its face reasonable. Exxon gave Complainant a choice between remaining at LaBarge in a non-safety sensitive engineering position with his pay and benefits protected for five years or transfer to the identical position of Field Foreman at the Gillette oil field. If he remained at LaBarge, he was told that Exxon would seek to find him a position for which he was qualified equivalent to Field Foreman and if and when there was such a vacant position he would be entitled to it. He chose to transfer to the position in Gillette. There he was given the position of Field Foreman with virtually identical duties and with the same

^{39/} The F.A.A. study relied upon by Complainant is not a study of relapse rates but rather a study of the effectiveness of the monitoring and testing program instituted to assist recovering alcoholic pilots. Notwithstanding its methodological weaknesses, the study lends no support to the majority's contention that no accommodation may be required.

^{40/} The majority relies on *Mantolite v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) to suggest that no accommodating condition could be imposed on Complainant absent a showing of "a reasonable probability of substantial harm." This may be the standard, but in cases in which the public safety is implicated, the standard is necessarily applied differently. As the court in *Dipompo v. West Point Military Academy*, 770 F. Supp. 887, 893 (S.D. N.Y. 1991) found:

The "reasonableness" of the probability necessarily must include some evaluation of the job itself and its setting. What may be a reasonable risk for a postal worker, as in *Mantolite*, whose job generally does not pose great hazards to those who perform it or to the public they serve, is not necessarily a reasonable risk for a firefighter, whose job is defined at almost every turn by potential for disaster to himself and others.

pay, benefits and opportunities for advancement. In fact the opportunities for promotion were probably greater in Gillette than they were at LaBarge. (T. 231-236). Recent case law supports a finding that the proposed accommodation was reasonable.

In *Kerno* the plaintiff, a salesman, suffered from obsessive compulsive disorder, post traumatic stress disorder with a secondary reactive depression and chronic depression. He found that these conditions made it difficult for him to work with a new supervisor. He asked his employer to redraw the sales regions so that he could work under a different regional sales manager. His employer refused to consider this alternative and instead offered to transfer him to his choice of open sales positions. Contending that a transfer would complicate his medical treatment and disrupt his family life, he declined the transfer and sued under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, alleging that his employer had failed to reasonably accommodate him. In granting summary judgment for the defendant, the court found that no jury could find a transfer under which the plaintiff retained all aspects of the job he held including job description, title, compensation and benefits to be an unreasonable accommodation. *Kerno*, at 23.

In *Guice-Mills v. Derwinski*, 967 F.2d 794 (2nd Cir. 1992) the plaintiff was a head nurse who suffered from a number of maladies, among them depression, severe anxiety, insomnia and migraine headaches. Upon her physician's recommendation, she requested a change in her duty hours. In response to her request, her employer offered her a position as a staff nurse with the requested hours and at the same pay as a head nurse. Unwilling to accept the demotion, she sued under the Rehabilitation Act claiming that her employer had failed to reasonably accommodate her disability. In rejecting her claim, the circuit court held that "(w)hen an employer offers an employee an alterative position that does not require a significant reduction in pay and benefits, that offer is a "reasonable accommodation" virtually as a matter of law. *Guice-Mills*, at 797.

Lastly, in *Kuehl* the plaintiff, a door greeter at a wholesale store, was diagnosed as suffering from chronic tibula tendinitis which prevented her from standing throughout her shift at work. She requested that she be given a stool to sit on as needed during the course of her shift. Her employer denied the request, but offered her a position as a cashier or in the alternative, agreed to split her shift to enable her to reduce the stress on her legs. She sued under the ADA. The court ruled that "(t)he plaintiff, by rejecting two reasonable alternative accommodations has lost any status she may have had under the ADA, as a qualified individual with a disability." *Kuehl*, at 803.

With these cases serving as guideposts, I find no basis upon which it can be concluded that Exxon's proffered accommodation was anything less than reasonable. Indeed I find it to be generous and fairly considered. In the present case, the majority's opinion presupposes that testing, supervisor evaluation and AA attendance would be a more effective accommodation. Regardless of the merits of that judgment, for the reasons given above, I think legally it is of no consequence. Nonetheless I think the majority's view is suspect and merits some comment.

Some of the shortcomings of the monitoring and supervision program that the majority touts are set out in *Altman v New York City Health and Hospitals Corporation*, 903 F. Supp. at 511. In *Altman*, the plaintiff, a recovering alcoholic, resisted his demotion from Chief of Internal Medicine to staff physician and contended that the defendant hospital should in lieu of demoting him have

subjected him to the “professional monitoring” program proposed by the Committee on Physicians’ Health. The court identified two problems common to such monitoring programs:

First, it must be noted that plaintiff’s history suggests that he was able to consume substantial quantities of alcohol without his impaired condition being noticed by his professional colleagues. Thus, even reasonable monitoring could not insure that plaintiff would be performing his duties without his judgment being impaired by alcohol.

Then later:

In addition, the people perhaps best equipped to monitor plaintiff’s performance and behavior in a less formal way -- the departmental staff members with whom he interacted on a day-to-day basis while performing his clinical and administrative duties -- would have been placed in the awkward position of having to judge his judgment, and if necessary, having to disobey the instructions of their supervisor. They also would have had to face the unsettling truth that, if they reported another relapse to plaintiff’s superiors, they would effectively have brought about the end of plaintiff’s professional career.

These are among the reasons that Exxon rejected a monitoring and supervision program in favor of its policy. (*See* testimony of Dr. Hayden). The majority is nevertheless concerned that Exxon’s policy may actually discourage self-reporting and drive alcoholics underground. This is a legitimate fear but not necessarily the inevitable outcome of Exxon’s policy. Under Exxon’s policy, an individual suffering from alcoholism has three choices. First, he could disclose his alcoholism and be transferred to an equivalent non-designated position while maintaining his pay and benefits and his entitlement to medical treatment. Second, he could fail to disclose and maintain sobriety. Third, he could fail to disclose and relapse and run the risk of the relapse being detected through testing, medical records or reports of his colleagues. The third choice poses the greatest risk to the individual because if his relapse is detected, he would lose his job and benefits. If he chooses courses one or two, Exxon and the public safety would benefit. I find no reason to believe that outcome three is more likely than the others. Even if I did, I believe employers retain the discretion to craft safety policies provided that those policies are not a mere pretext for discriminating against individuals with disabilities.

Exxon continues to examine its policies in light of the available evidence. Its policies are the matter of much debate in the corporation. (*See* testimony of James Rouse). As it examines the experience of other companies and organizations, it intends to regularly revisit its policy to determine whether or not it best serves the interests of the company and public. Rather than compelling businesses to adopt the one model endorsed by the majority (*i.e.* FAA’s), employers should be encouraged to constantly rethink and when appropriate modify their policies. There is no right answer to combating the dangers posed by substance abuse in the workplace. There are only partial, evolving solutions. Exxon’s response may not be the best, but as it was applied to Complainant, it did not violate the Rehabilitation Act.

This brings me to my last point. My dissent is addressed to the facts of this case. I do not hazard a guess as to whether Exxon's policy as it has been applied in other cases would violate the Rehabilitation Act. Exxon may or may not have ever designated the number of positions as safety sensitive. The accommodations offered other employees may or may not be reasonable. For that matter, by the time this decision is issued Exxon may have changed its policy. Claims under the Rehabilitation Act are fact specific. With only the illumination of the facts of a particular complaint, I would not arrogate the responsibility to supervise general compliance with the law. Employers should be given the opportunity to adjust their safety policies in light of specific decisions, rather than be compelled to discard their policies in response to a general indict. Wrongs against specific individuals can be corrected. Public safety should not be compromised pending review and implementation of an alternative policy. Therefore I believe the Board's order is unnecessarily and overly broad insofar as it addresses the treatment of employees whose cases are not before this Board.

KARL J. SANDSTROM
Member